

EMPLOYER STATUS DETERMINATION

R. J. CORMAN d/b/a R. J. CORMAN RAILROAD CONSTRUCTION

This is the determination of the Railroad Retirement Board regarding the status of R. J. Corman d/b/a R. J. Corman Railroad Construction Company, (CRC) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA). CRC has not previously been determined to be an employer under the RRA and the RUIA.

Information about CRC was furnished by Mr. Kenneth Adams. CRC is a sole proprietorship which began operations in 1973. It currently has approximately 165 employees. Mr. R. J. Corman, who owns a controlling interest in CRC, also has a controlling interest in several railroads covered under the Railroad Retirement Act. Those railroads as follows:

- R. J. Corman Railroad Corporation/Bardstown Line
- R. J. Corman Railroad Company/Memphis Line
- R. J. Corman Railroad Company/Cleveland Line
- R. J. Corman Railroad Company/Western Ohio Line
- R. J. Corman Railroad Corporation
- R. J. Corman Railroad Company/Pennsylvania Lines, Inc.

CRC has approximately 30 employees in its administrative offices.

This group spends about 50 percent of its time on business related to rail carriers. Of this 50 percent approximately 11 percent is business done for CRC's affiliated rail carriers and 39 percent is for non-affiliated rail carriers. CRC also employs approximately 67 employees in its general construction division.

These employees perform track maintenance and repair work and capital projects for railroads and other industries. Employees in this group spend approximately 73 percent of their time on business connected with rail carriers, of which 11 percent is for affiliated rail carriers.

CRC also has three derailment divisions employing approximately 31 employees. Approximately 80 percent of their time is spent on business related to rail carriers none of which is for affiliated carriers. Finally, CRC operates two warehouse/distribution centers, which employ approximately 25 employees who spend no time on business connected to rail carriers.

For the last three years (1993, 1994 and 1995), approximately 66 percent of CRC's revenues were derived from rail related business. Approximately 5 percent of CRC's revenue was derived from its affiliated carriers. For this same period, approximately 57.6 percent of CRC's hours worked were in

connection with rail related business. Of this total approximately 5 percent was for its affiliated carriers.

Section 1(a)(1) of the RRA defines the term "employer" to include:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *. [45 U.S.C. §231(a)(1)(i) and (ii)].

Section 1(a) of the RUIA (45 U.S.C. § 351(a)) contains essentially the same definition.

Section 202.7 of the Board's regulations provides that service is in connection with railroad transportation:

* * * if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. [(20 CFR 202.7)].

The Board has never held that a company which performs service for the railroad industry in general, but performs no service for its rail affiliate, is an employer. In Board Order 85-16 the Board ruled that a car repair company affiliated with a railroad that performed only 4.4 percent of its service for the rail affiliate was not performing covered service in connection with rail transportation. See also, Board Order 83-113. The Board has ruled that a company which only derives 2.5% of its revenues from its affiliated railroads is not performing a service in connection with railroad transportation. See Board Coverage Decision 93-79, In Re VMV Enterprises Incorporated. In that case

R. J. CORMAN d/b/a R. J. CORMAN RAILROAD CONSTRUCTION

VMV performed only 2.5% of its services for its rail affiliate and derived only 2.5% of its revenues from that business. VMV did perform a substantial amount of its work, 55.7%, for the rail industry as a whole. Because of the small amount of work performed by VMV for its affiliated railroad, a majority of the Board found that VMV was not performing a service in connection with railroad transportation.

The Board has determined that a rail carrier affiliate which performed car and locomotive repairs performed a service in connection with rail transportation where 95% of the company's business derived from the rail industry, including approximately 25 percent from its affiliated railroad. In Re Appeal of Livingston Rebuild Center, Inc., Board Order 91-122. The decision of the Board was affirmed by the Court of Appeals for the Seventh Circuit in Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295, (7th Cir. 1991). See also Despatch Shops, Inc. v. Railroad Retirement Board, 153 F.2d 644 (D.C. Cir., 1946).

In another case that should be considered, Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir., 1983), the Court reviewed the application of the "service in connection with" language and section 202.7 of the Board's regulations to a company that was engaged in manufacturing crossties. In affirming the Board's ruling that Concrete Crosstie was a covered employer, the Court distinguished Concrete Crosstie, which did 90 percent of its business with Florida East Coast, from the situation addressed in a 1940 decision by the Board's General Counsel (L-40-403) wherein Pullman Standard Car Manufacturing Company was found not covered on the basis that most of Pullman Standard's business was with non-affiliated rail carriers and non-railroad companies.

The Court in Railroad Concrete Crosstie declined to provide guidance as to the amount of business that must be conducted with an affiliated railroad in order for a company to be a covered employer, and we are not prepared to establish any minimal affiliate service level in connection with this case.

In the instant case CRC performs approximately 57.6 percent of its hours and derives approximately 66 percent of its revenues from rail carriers, but does only about 5 percent of its business with affiliated rail carriers. Consistent with prior decisions

R. J. CORMAN d/b/a R. J. CORMAN RAILROAD CONSTRUCTION

of this agency, it is the determination of the majority of the Board, with Labor Member Speakman dissenting, that the level of service performed by R. J. Corman Railroad Construction is not sufficient to bring it within the definition of employer in section 1(a)(1)(ii) of the RRA.

R. J. CORMAN d/b/a R. J. CORMAN RAILROAD CONSTRUCTION

Based on the foregoing, it is the determination of the majority of the Board that CRC is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

V. M. Speakman, Jr.
(Dissenting opinion attached)

Jerome F. Kever